

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHNNY R. ORTIZ)	
Claimant)	
VS.)	
)	Docket No. 250,118
A.M. PLUMBING, INC.)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent requested Appeals Board review of Jon L. Frobish's July 24, 2001, Award. The Appeals Board heard oral argument on January 11, 2002.

APPEARANCES

Claimant appeared by his attorney, Brian D. Pistotnik of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffery R. Brewer of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record listed in the Award. The Board has also adopted the stipulations listed in the Award. At oral argument before the Board, the parties questioned stipulation number nine that set forth the amounts of temporary total disability paid to the claimant. After oral argument, the parties agreed claimant was paid a total of 69.29 weeks of temporary total disability compensation in the total amount of \$20,231.85, instead of the 69.29 weeks in the total amount of \$20,272.18 that was stated as a stipulation in the Award.

ISSUES

The Administrative Law Judge (ALJ) awarded claimant a 79.34 percent permanent partial general disability based on a work disability. The respondent agrees that claimant suffered a work disability. But respondent contends a post-injury weekly wage should be imputed to claimant and the record further supports that claimant's job task loss is

substantially lower than the job task loss found by the ALJ. The respondent argues claimant's resulting work disability is between 27 and 34.5 percent instead of the 79.34 percent found by the ALJ.

In contrast, claimant contends, as a result of his severe work-related low back injury, he is realistically unemployable and is, therefore, entitled to a permanent total disability award. In the alternative, if the Board does not conclude that claimant is entitled to a permanent total disability award, then claimant requests the Board to affirm the ALJ's 79.34 percent permanent partial general disability award.

Thus, the nature and extent of claimant's disability is the only issue before the Board for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Board makes the following findings and conclusions:

The Board finds the 79.34 percent permanent partial general disability award should be affirmed. The Board also agrees with the ALJ's findings and conclusions as set forth in the Award. Therefore, there is no need to repeat those findings and conclusions in this Order. The Board adopts those findings and conclusions as its own which are not inconsistent with this Order.

Claimant injured his low back on October 13, 1999, as he lifted a crate full of iron fittings while working as a plumber's helper for respondent. Respondent first provided claimant with conservative medical treatment. Because claimant did not improve, claimant was referred to orthopedic surgeon John P. Estivo, D.O.

Dr. Estivo diagnosed claimant with a herniated disc at L5-S1 and Grade I spondylolisthesis also at L5-S1. Dr. Estivo recommended surgery and referred claimant to neurosurgeon Paul S. Stein, M.D., for consultation concerning the surgery.

On December 14, 1999, claimant underwent low back surgery with Dr. Stein performing a laminectomy and discectomy at L5-S1 and Dr. Estivo performing a fusion at L5-S1 using titanium cages. For approximately two months, claimant's low back pain and right leg pain improved. Then claimant had recurrent right leg pain. Claimant continued under both Dr. Stein's and Dr. Estivo's care and treatment. But Dr. Estivo was claimant's primary post-surgery physician.

Dr. Estivo followed claimant until November 22, 2000. During that post-surgery period, Dr. Estivo had claimant undergo physical therapy and epidural steroid injections, participate in a home exercise program, and he continued claimant on pain medication.

Claimant also underwent a post-surgery MRI examination and a right lower extremity nerve conduction test. Both diagnostic examinations were normal.

Although claimant continued to have pain in his low back and down his right lower extremity, Dr. Estivo determined there was not anything more he could do for claimant. He released claimant from his care on November 22, 2000. In accordance with the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (AMA Guides), Dr. Estivo determined claimant suffered a 10 percent permanent functional impairment as a result of his work-related injury. At Dr. Estivo's deposition, on cross-examination by claimant's attorney, Dr. Estivo insisted that claimant's low back injury and resulting surgery had not caused claimant to lose any motion segment integrity in his low back which would have placed claimant's low back injury into DRE Lumbosacral Spine Impairment Category V for a 25 percent permanent functional impairment rating.

Dr. Estivo placed permanent restrictions on claimant's activities with a lifting limit of no more than 35 pounds. He also limited claimant's bending, twisting, and stooping to no more than one-third of an eight hour day.

Dr. Estivo reviewed a list of job tasks claimant had performed in the 15 year period next proceeding his work-related accident that was compiled by vocational rehabilitation expert Karen Crist Terrill. Dr. Estivo opined that as a result of claimant's work-related low back injury and resulting surgery claimant could no longer perform 42 percent of those job tasks.

In addition to Dr. Estivo, two other physicians testified in this case. At claimant's attorney's request, physical medicine and rehabilitation physician Pedro A. Murati, M.D., examined and evaluated claimant on January 22, 2001. On May 10, 2001, at respondent's attorney's request, George Fluter, M.D., examined and evaluated claimant.

Dr. Murati found claimant with complaints of low back pain radiating down his right buttocks and right lower extremity. He diagnosed claimant with low back pain from failed back surgery syndrome. As a result of claimant's work-related low back injury, Dr. Murati, utilizing the AMA Guides DRE Lumbosacral Spine Impairment Category V, found claimant had a 25 percent permanent functional impairment.

Permanent restrictions were imposed by Dr. Murati of lifting limited to 10 pounds occasionally and 5 pounds frequently. Claimant should not bend, climb ladders or crawl. He should alternate sitting, standing, and walking. On an occasional basis claimant can climb stairs, squat and drive.

After reviewing vocational expert Jerry Hardin's work task list, Dr. Murati opined that claimant was unable to perform 51 of the 58 job tasks for an 88 percent work task loss. During Dr. Murati's deposition, he also expressed his opinion that claimant's low back injury would require him to lay down on occasion during the normal work day. Dr. Murati felt

claimant was permanently and totally disabled because he was realistically unemployable.

Dr. Fluter found claimant with complaints of stabbing pain in his low back and stabbing pain and numbness into his right buttocks, right lower extremity and foot. He diagnosed claimant with (1) chronic low back and right leg pain, (2) status post-laminectomy with posterior interbody fusion using titanium cages at L5-S1, (3) bilateral spondylolysis at L5, and (4) Grade I spondylolisthesis L5 on S1 with radiculopathy.

Using Table 72, page 110, of the *AMA Guides*, Dr. Fluter assessed claimant with a 10 percent permanent functional impairment of the body as a whole in accordance with DRE Lumbosacral Spine Impairment Category III. But on cross-examination by claimant's attorney, after Dr. Fluter reviewed claimant's October 29, 1999, MRI examination, Dr. Fluter determined that claimant had a loss of motion segment integrity of the lumbar spine. Thus, Dr. Fluter changed his functional impairment rating from 10 percent to 25 percent in accordance with DRE Lumbosacral Spine Impairment Category V.

Dr. Fluter imposed permanent restrictions on claimant's activities of limited lifting up to 35 pounds occasionally, 15 pounds frequently and 10 pounds constantly. He limited claimant's bending, stooping and twisting to an occasional basis. Claimant was limited to sitting or standing of no more than 2 hours at a time with a provision to change positions as needed for comfort. All lifting should be carried out with proper lifting techniques and all other activities should be carried out using appropriate body mechanics.

Based on those permanent restrictions, Dr. Fluter reviewed the job task list compiled by Ms. Terrill. The ALJ found that Dr. Fluter's opinion on the job task list resulted in claimant having a 42 percent job task loss. The Board has reviewed Dr. Fluter's job task loss opinion contained in his deposition and finds that the 42 percent represents the minimum loss, and depending on the interpretation of Dr. Fluter's testimony in regard to each individual job task, the doctor's opinion could be interpreted to be higher. Also, according to Dr. Fluter, claimant retains the physical ability to perform some type of work within the open labor market.

At the April 30, 2001, regular hearing, claimant offered and the ALJ admitted into evidence a list of employers where claimant had applied for employment since Dr. Estivo released him on November 22, 2000. Respondent also employed vocational rehabilitation consultant Dan Zumwalt of Terrill and Associates, Inc., to develop a job placement program for claimant. Claimant successfully performed the requirements of the job placement program except for the requirement that he contact ten employers per week in addition to the total of 28 suggested contacts made by Mr. Zumwalt.

Because claimant had not been able to work since his October 13, 1999, accident, his wife had to go to work and claimant assumed the responsibility of caring for their four children ages 3 through 9. During the job placement program, respondent promised to provide claimant with temporary total disability compensation benefits. But respondent

failed to provide those benefits, and claimant testified that he was unable to make all the required job contacts because he did not have gas money and did not have money to pay for babysitting services for his minor children. In fact, claimant testified that during the time he was not receiving the promised temporary total disability compensation he had to contact family members for loans and also had to pawn his television and VCR for money needed to support his family.

The respondent's principal argument is that claimant's appropriate work disability is substantially less than the 79.34 percent found by the ALJ because the wage loss component of the work disability test should not use claimant's actual wage loss of 100 percent. Instead, a wage should be imputed because claimant did not make a good faith job search effort according to respondent. After claimant was released by Dr. Estivo with permanent restrictions, the respondent could not accommodate those restrictions and did not return claimant to work. Thereafter, the Board finds the record as a whole proves that claimant made a good faith effort to find appropriate employment but has failed to do so. Thus, the Board agrees with the ALJ's decision that claimant suffered a 100 percent wage loss.¹

The respondent, however, also argues that claimant retains the ability to earn either \$371.20 per week based on the opinion of vocational expert Karen Crist Terrill or \$300 per week based on the opinion of vocational expert Jerry Hardin. The respondent claims that vocational consultant Mr. Zumwalt found claimant a job within his permanent restrictions as an institutional food preparer at a halfway house for adults in transition from incarceration to the community. But the halfway house would not hire claimant because claimant, some 20 years earlier had been convicted of aggravated battery which disqualified him from that job. Respondent argues the felony conviction is claimant's responsibility and respondent should not be penalized for claimant's past criminal behavior. Therefore, respondent contends the institutional food preparer's weekly earnings of \$371.20 per week should be imputed to claimant in computing his post-injury wage loss. Thus, respondent argues comparing claimant's pre-injury average weekly wage of \$446.16 with the \$371.20 imputed post-injury wage results in a 17 percent wage loss instead of a 100 percent wage loss.

The Board, however, finds that at the time respondent employed claimant he had the felony conviction and there is no evidence in the record that claimant tried to either hide or otherwise misrepresent that the felony conviction was on his record. Therefore, the Board concludes, that the prospective employer's disqualifying the claimant from employment for the felony conviction is not relevant in deciding whether claimant made a good faith effort to find appropriate post-injury employment.

¹ See K.S.A. 1999 Supp. 44-510e(a) and *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The Board also finds questionable whether the institutional food preparer job was within Dr. Estivo's post-injury restrictions. Mr. Zumwalt and Ms. Terrill both indicated through their deposition testimony that depending on the individual employer that certain accommodations would be made for helpers to perform the heavy lifting of the institutional food preparer's job. Jerry Hardin, however, testified that because of the heavy lifting and the bending and stooping required, claimant did not possess the post-injury ability to perform the institutional food preparer's job. Additionally, claimant testified he simply could not stand long enough, bend, stoop, or lift the heavy items required for him to perform the institutional food preparer's job.

In regard to claimant's job task loss, the Board finds claimant's appropriate post-injury restrictions lie somewhere between the limited restrictions imposed by Dr. Murati and the less limited restrictions imposed by either Dr. Estivo or Dr. Flutter. Based on that analysis, the Board concludes that the record as a whole proves that claimant retains the ability to perform light to sedentary work in the open labor market and is, therefore, not permanently and totally disabled. Claimant has demonstrated he has the physical ability to do either light or sedentary type of work as he is presently capable of caring for his four children which includes, among other things, driving a car, dressing the children, and cooking the children's meals.

The ALJ averaged the three task loss opinions of the three physicians who testified in this case. The Board finds that the 58.67 percent task loss is appropriate as it lies somewhere between Dr. Estivo's 42 percent opinion and Dr. Murati's 88 percent opinion.

The ALJ failed to make a finding in regard to claimant's permanent functional impairment. The Board finds Dr. Flutter's and Dr. Murati's 25 percent opinion the most persuasive and best represents the severity of his low back injury.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that the ALJ Jon L. Frobish's July 24, 2001, Award granting claimant a 79.34 percent permanent partial general disability should be affirmed but the calculation of the Award should be modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Johnny R. Ortiz, and against the respondent, A.M. Plumbing, Inc., and its insurance carrier, Continental Western Insurance Company, for an accidental injury which occurred on October 13, 1999, and based upon an average weekly wage of \$422.68 until February 20, 2000, and thereafter an average weekly wage of \$446.16.

Claimant is entitled to 18.57 weeks of temporary total disability compensation at the rate of \$281.78 per week² or \$5,232.65, followed by 50.72 weeks of temporary total disability compensation at the rate of \$297.45 per week³ or \$15,086.66 followed by \$79,680.69 of permanent partial disability compensation to be paid at \$297.45 per week, for a 79.34 percent permanent partial general disability, making a total award of \$100,000.00

As of November 30, 2002, claimant is entitled to 18.57 weeks of temporary total disability compensation at the rate of \$281.78 per week or \$5,232.65, followed by 50.72 weeks of temporary total disability compensation at the rate of \$297.45 per week or \$15,086.66, followed by 163.43 weeks of permanent partial disability compensation at the rate of \$297.45 per week or \$48,612.25 for a total due and owing of \$68,931.56, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, claimant is entitled to \$31,068.44 of permanent partial disability compensation at the rate of \$297.45 per week, until fully paid or until further order of the Director.

The respondent is ordered to pay for all reasonable and necessary medical expenses incurred for the treatment of claimant's work-related injury.

All other orders contained in the Award are adopted by the Board.

IT IS SO ORDERED.

Dated this ____ day of November 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

² The claimant's average weekly wage between the October 13, 1999, accident date and February 20, 2000, was \$442.65 resulting in a \$281.78 compensation rate. See July 24, 2001, Award, Stipulation No. 8.

³ The claimant's average weekly wage commencing on February 21, 2000, was \$446.16 for a \$297.45 per week compensation rate. See July 24, 2001, Award, Stipulation No. 8.

c: Brian D. Pistotnik, Attorney for Claimant
 Jeffery R. Brewer, Attorney for Respondent
 Jon L. Frobish, Administrative Law Judge
 Director, Division of Workers Compensation